FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 30 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1959

No. 318

SINASON TEICHER INTER AMERICAN GRAIN CORP.,

Petitioner,

AGAINST

COMMODITY CREDIT CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

CHARLES A. ELLIS,
Counsel for Petitioner,
42 Broadway,
New York 4, New York.

Of Counsel:

MILTON S. TEICHER,
39 Broadway,
New York 6, N. Y.

LESTER LYONS,
545 Fifth Avenue,
New York 17, N. Y.

LOWER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WOrth 2-0689.

INDEX

	PAGE
1. Can CCC escape 7 U. S. C. 1427, the source of its "determining" powers employed in contracting, and expressly relied on by respondent below?	1
2. The statute, 7 U. S. C. 1427, affords the only "exceptional reason" enabling CCC to make any use limitation contracts, and must be looked to in determining their meaning and effect	3
3. Respondent's present contention that no statutory issue is presented is contrary to the contentions made by respondent and adopted by the Courts below	4
4. Can CCC utilize its "determining" powers under 7 U. S. C. 1427 as an instrument for unilateral and punitive speculating?	7
5. Respondent's confusion of rights and remedies	8
Conclusion	9

CASES CITED

Chicago Daily News v. Kohler, 360 Ill. 351, 363	3
R. C. A. Manufacturing Co. v. Whiteman, 2 Cir., 114 F. 2d 86, 89, cert. denied 311 U. S. 712	3

PAGE

United States v. Purcell Envelope Co., 249 U. S. 313, 318, 319 ..... 2, 6

United States v. Speed, 8 Wall. (75 U. S.) 77, 83 ... 2, 6

Willard v. Taylor, 8 Wall. (75 U. S.) 557, 564 8

STATUTES CITED

7 U. S. C., Sec. 1427 ..... 1, 2, 3, 4, 5, 6, 7, 8

15 U. S. C., Sec. 714 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 318

SINASON TEICHER INTER AMERICAN GRAIN CORP.,
Petitioner,

AGAINST

COMMODITY CREDIT CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

1. Can CCC escape 7 U. S. C. §1427, the source of its "determining" powers employed in contracting, and expressly relied on by respondent below?

The principal content of Respondent's Brief is its bald, unsupportable assertion that "this case presents no statutory issues or important questions of contract law" (Respondent's Brief, p. 6), coupled with its calculated omission even to cite 7 U. S. C. §1427.

The statement is transparent and absurd once that statute and the Petition are read. Its potentiality lies solely in the possibility that, if read first, such an assertion by

or in the name of the Solicitor General of the United States might be deemed the postulate of the case, acknowledged by the parties, and thus beguile the Court from reading the statute and the Petition to ascertain the great questions in truth presented thereby.

It is that statute, 7 U. S. C. §1427 (Appendix E of Petition, p. 50), which confers, with "restrictions", upon CCC as an agency and instrumentality of the United States, CCC's peculiar power and discretion of "determining" the "prices, terms, and conditions as it determines", when exercising its power thereunder to "sell"; and CCC clearly relied on that statute in making the contract.

The contract itself, in Section 4 (Petition Appendix F, pp. 52-53), states that the in store "sales price of the beans" shall be the higher of three sales prices, each "*determined* by CCC" and "*in effect on the date of CCC's acceptance of the buyer's bid*". Thus recited, they were, therefore, already or thereby "determined" as recited.

This case thus presents, inescapably, under 7 U. S. C. §1427, the great question whether the in store sale prices, terms and conditions could be "determined by CCC", "in effect on the date of CCC's acceptance of the buyer's bid", and, as such, be embodied in the contract, as recited therein, without CCC's having thereby "exercised" (Cf. *United States* v. *Speed*, 8 Wall. (75 U. S.) 77, 83) and "exhausted" (Cf. *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318, 319), its discretion and power under 7 U. S. C. §1427.

Respondent's total failure to discuss this question, presented by the Petition, or to attempt to refute its importance or merit, is indicative of realization that the case should be reviewed and reversed.

The importance of the questions this case presents under 7 U. S. C. §1427, moreover, is not limited to the particular GRT-318 form of contract here involved, as now contended by Respondent (Respondent's Brief, p. 6), but extends to *all* CCC contracts which embody *any* "prices, terms, and conditions as it determines" in exercise of its powers under 7 U. S. C. §1427; and it is of national importance that this Court review and determine these questions in this case.

2. The Statute, 7 U. S. C. §1427, affords the only "exceptional reason" enabling CCC to make any use limitation contracts, and must be looked to in determining their meaning and effect.

Limitations or restrictions by a seller upon use by a purchaser of property being sold "are at least *prima facie* invalid," and "must be justified for some exceptional reason" (*R. C. A. Manufacturing Co.* v. *Whiteman*, 2 Cir., 114 F. 2d 86, 80, cert. denied 311 U. S. 712); and Courts then "require unequivocal language to create such restrictions" (*Chicago Daily News* v. *Kohler*, 360 Ill. 351, 363).

The required "exceptional reason" spoken of by Judge Learned Hand in the *R. C. A.* case is afforded here only by the statute, 7 U. S. C. §1427. And this case involves fundamentally the great questions presented by the Petition as to the scope, exercise, final and conclusive effect of exercise, and exhaustion by exercise, of the power and discretion conferred on CCC by 7 U. S. C. §1427.

3. Respondent's present contention that no statutory issue is presented is contrary to the contentions made by Respondent and adopted by the courts below.

Respondent's present bald assertion that the case "presents no statutory issues" (Brief for Respondent, p. 6) is directly contrary to the affidavits of Assistant United States Attorney Savage and Mr. Dean, Deputy General Sales Manager of Commodity Stabilization Service, relied on by Respondent below (App. pp. 68a-70a; 78a-80a).

Both affidavits quoted from 7 U. S. C. §1427 (App. pp. 69a; 78a-79a) and contended that the statute afforded CCC a post-contractual "absolute discretion" as respects in store sale, exercisable by CCC upon expiration of the 180 days time allowed for export.

Mr. Savage insisted that "To have *freed* the subject beans for unrestricted domestic sale *after* plaintiff's failure to export" (App. p. 68a), "would have been contrary to *the requirements of 7 U. S. C. 1427*" (App. p. 69a) and "*ultra vires*" (App. p. 70a) unless "CCC *in its absolute discretion determined* that unrestricted domestic disposal would not have an unstabilizing effect".

Mr. Dean's affidavit insisted that "The prices, terms and conditions" for an in store sale "*must be* such as will not discourage or deter the acquisition and carrying of normal inventories by processors, dealers and manufacturers"; that "Sales *cannot be made* at prices, in outlets, or for uses, which unduly interfere with the operation of the price support program or depress farm prices on farm income" (App. 79a); that CCC therefore had "*an option*" to *enforce* the in store sale provisions provided this "would be consistent with the *statutory and policy restrictions*", but that "Before the *option* could be exercised in any case by Commodity Credit Corporation, it *would have to be determined* that the exercise of

such option and the delivery of the beans for unrestricted use would comply with the disposal policy of the Corporation and the *statutory directives*" (App. p. 80a).

He asserted that "*When the period for exportation under the contract* * * * *had expired*, Commodity Credit Corporation carefully *considered whether* it should exercise its *option* to deliver the beans for unrestricted use * * * and *it was determined* that a *delivery* for unrestricted use would * * * adversely affect the current price support program" and "Accordingly, Commodity Credit Corporation notified Sinason Teicher Inter American Grain Corp. that beans could not be *delivered* for unrestricted use" (App. 82a).*

Thus the fundamental point of Respondent's defense and counterclaim was its contention that, notwithstanding the detailed in store sale "prices, terms and conditions" determined by CCC under 7 U. S. C. §1427 and embodied in the contract and specifically "agreed [to] by the parties hereto" (Contract Sec. 4, App. pp. 13a-14a; Appendix F of Petition, p. 54), the statutory "*requirements of 7 U. S. C. 1427*", "*the statutory and policy restrictions*" and "*the statutory directives*" independently afforded and imposed on CCC a continuing statutory post-contractual "absolute discretion", exercisable "when the period for exportation under the contract * * * had expired", to determine *then* whether to perform or not to perform the in store sale provisions previously determined by it and embodied in the contract.

---

* Actually, CCC had claimed "breach of contract" by Petitioner, and that CCC would hold Petitioner responsible for damages (App. p. 55a); and CCC counterclaimed for $85o5,659.86 damages (App. pp. 27a-29a), and cross-moved for summary judgment therefor (App. 63a), which motion the District Court denied on the ground that CCC having failed to demand in store sale performance, "cannot claim a breach by plaintiff" (Appendix B of Petition, p. 45).

Such theory was adopted by the Courts below, although with notable confusion. The District Court held that CCC "did not breach the contract by not delivering the balance of the beans 'in store' at the end of the 180 day period wherein plaintiff was to export them", but also held that CCC "cannot claim a breach by plaintiff", because CCC had failed to demand in store sale performance by plaintiff (Appendix B of Petition, pp. 44-45).

The Court of Appeals first ruled that Petitioner's failure to expor[illegible] the beans justified "rescission by the defendant" of th[illegible] in store sale provisions (Appendix C of Petition, p. 47); then, in denying rehearing, it held that the "rescission" theory was "inapposite", but that "the contractual provisions *defining consequences* of the buyer's failure are not exclusive and that the petitioner's default relieved defendant of *further obligation to perform*" (Appendix D of Petition, p. 48).

A resulting basic and fundamental question, therefore, is whether, under 7 U. S. C. §1427, notwithstanding the in store sale "prices, terms, and conditions" of the contract, already "determined" by CCC and specifically "agreed [to] by the parties", CCC, perforce that statute, had a statutory continuing absolute discretion to be "relieved" of its "further obligation to perform" the in store sale provisions agreed to, or whether its statutory discretion as respects in store sale as well as sale for export had been fully "exercised" (Cf. *United States* v. *Speed*, 8 Wall [75 U. S.] 77, 83) and "exhausted" (Cf. *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318, 319), when the in store sale provisions, including complete in store sale "prices, terms, and conditions" already determined by it, were embodied in the contract.

4. Can CCC utilize its "determining" powers under 7 U. S. C. §1427 as an instrument for unilateral and punitive speculating?

While not so labeled in its Brief, Respondent's whole argument is premised on a theory that CCC's "determining" powers under 7 U. S. C. §1427 enable it to make determinations of "prices, terms, and conditions" which, although embodied and agreed to by both parties in a contract, become binding on a buyer, but wholly tentative and optional as to CCC.

This involves the theory that CCC's "determining" power under 7 U. S. C. §1427 enables it to speculate on the basis of determinations which are punitively binding on a buyer but subject to post-contractual avoidance by CCC.

Such is the effect, for example, of Respondent's argument that the in store sale "prices, terms, and conditions", determined by CCC and embodied in the contract, established as to CCC merely an optional "remedy" for the benefit alone of CCC and which may be insisted upon or waived by CCC at its choice (Respondent's Brief, pp. 7-8).

But CCC is not a mere John Doe or Richard Roe, freely and sharply trading for profit, but is "an agency and instrumentality of the United States" (15 U. S. C. §714), whose every contract embodying "prices, terms, and conditions" involves CCC's first or thereby "determining" these under 7 U. S. C. §1427.*

* The cases cited in Respondent's Brief, p. 8, are entirely different and have no bearing here. Most of them are specific performance cases holding that specific performance in equity is not precluded by provisions for forfeitures of down payments by purchasers. Others are cases holding that provisions for payment by a contractor of a stated sum if performance fell below stated requirements do not relieve the contractor of his obligation to perform.

The power of "determining" these is not a power of "determining" them as respects the other contractor alone, but of "*determining*" them—i. e., "determining" them for all purposes of the contract which embodies them.

The embodiment in the contract of the in store sale "prices, terms, and conditions" necessarily involved CCC's "*determining*" them under 7 U. S. C. §1427 for all purposes of the contract, as respects CCC as well as the buyer. When embodied in the contract, CCC could not later maintain that these determinations were punitively binding on the buyer, but were tentative and speculative as to CCC. The statute, 7 U. S. C. §1427, gives CCC no such power to speculate and make post-contractual change of "determinations" without the consent and at the sole risk of the buyer.

5. Respondent's confusion of rights and remedies.

The in store sale provisions are not, as Respondent represents (Respondent's Brief, p. 7), provisions which merely establish a "remedy".

On the contrary, they establish contractual *rights*—what paragraph 4 of the contract itself calls "his *rights* under the in store sale" (App., p. 13a; Appendix F of Petition, p. 54)—*rights* which were as definitely "determined" by CCC under 7 U. S. C. §1427 and contracted for by the parties as were the sale for export rights. And as this Court frequently has held, there is a fundamental distinction between rights and remedies.

The in store sale provisions are similar to but more complete than "a continuing offer to sell" at a pre-determined price, embodied in a lease, such as involved in *Willard* v. *Taylor*, 8 Wall. (75 U. S.) 557, 564. They are rather an effective part of a continuing contract of pur-

chase and sale—at one pre-determined price for export within 180 days, and at another pre-determined price for unrestricted use upon expiry of 180 days. Petitioner, it is not denied, was *bound* thereby; but *so also, was CCC.*

CONCLUSION

The quality of post-contractual discretion claimed by CCC to refuse to perform the in store sale provisions "determined" by CCC under 7 U. S. C. §1427 and agreed to by both parties to the contract presents questions of national importance which this Court should review.

Respectfully submitted,

CHARLES A. ELLIS,
Counsel for Petitioner,
42 Broadway,
New York 4, New York.

Of Counsel:

MILTON S. TEICHER,
39 Broadway,
New York 6, N. Y.

LESTER LYONS,
545 Fifth Avenue,
New York 17, N. Y.